

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 19-CR-25-JDP

ALEXANDER W. KAWLESKI,
Defendant.

Madison, Wisconsin
December 16, 2020
1:08 p.m.

STENOGRAPHIC TRANSCRIPT OF VIDEOCONFERENCE EVIDENTIARY HEARING
HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

APPEARANCES:

For the Plaintiff:

Office of the United States Attorney
BY: LAURA A. PRZYBYLINSKI FINN
ELIZABETH ALTMAN
Assistant United States Attorneys
222 West Washington Avenue, Suite 700
Madison, Wisconsin 53703

For the Defendant:

Federal Defender Services of Wisconsin
BY: JOSEPH A. BUGNI
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703

Also appearing: ALEXANDER W. KAWLESKI, Defendant

Jennifer L. Dobbratz, RMR, CRR, CRC
U.S. District Court Federal Reporter
United States District Court
120 North Henry Street, Rm. 410
Madison, Wisconsin 53703
(608) 261-5709

1 (Proceedings called to order at 1:08 p.m.)

2 THE CLERK: Case No. 19-CR-25-JDP, *United States of*
3 *America v. Alexander Kawleski*, called for an evidentiary
4 hearing.

5 May we have the appearances, please.

6 MS. PRZYBYLINSKI FINN: On behalf of the United States,
7 Laura Przybylinski Finn along with Elizabeth Altman for the
8 United States.

9 THE COURT: Good afternoon.

10 MR. BUGNI: Good afternoon, Your Honor. Joe Bugni
11 appearing on behalf of Alexander Kawleski.

12 THE COURT: All right. Good afternoon to everyone
13 here.

14 All right. So we're here to follow up on the -- I guess
15 what we're dealing with is a defense proffer for the evidentiary
16 hearing that has been requested. I got Mr. Bugni's memo. I'm
17 not sure exactly how to proceed. Mr. Bugni's memo was meant to
18 lay everything out for me in advance, so he's done that. Why
19 don't we start by getting the government's response to the memo,
20 and then we'll use the time as Mr. Bugni suggests, to clarify,
21 amplify, and answer my questions.

22 MS. PRZYBYLINSKI FINN: Thank you, Your Honor. The
23 government's position remains the same, that if this is newly
24 discovered evidence at all, that it's inadmissible as hearsay,
25 and if it is admissible, it's only admissible for impeachment,

1 and, therefore, does not support grounds for a new trial. We're
2 really talking about Mr. Cecil's statement, and I think it's
3 important to go back to what it is he actually said, how many
4 times he changed his statement, and what it could even possibly
5 mean.

6 So initially this comes up because he called our office and
7 said, "Look, my ex-girlfriend, mother of my kid, testified. I
8 think she might have lied at trial." Okay? So we go, and we
9 follow up. When we follow up, he says very clearly that Tracy
10 did not say anything specific about what was on the Apple
11 computer, and she talks about that Apple computer. That's what
12 Mr. Cecil says the issue is, that she had this Apple computer
13 and that she found images of young girls. That was it. That's
14 all he knew. Then miraculously when Mr. Bugni goes and
15 interviews him, he's like, "Well, she said that there were
16 images of his stepdaughter flashing him."

17 First of all, there are no images on that Apple computer at
18 all. There are no images on the phone drive of any flashing, so
19 at best this is Mr. Cecil making up things as he goes along.
20 He's an unreliable witness no matter what he says, and it's just
21 not enough for a new trial. It's an extraordinary remedy, and
22 there's just nothing extraordinary here really except for the
23 new theory of defense that really seems to be made up out of
24 whole cloth, and if not, if Mr. Kawleski really says this is how
25 this happened, all of that was available to him at the time of

1 trial. That certainly is not newly discovered. And, finally,
2 this idea that the text message supports this or that Mr. Bugni
3 can somehow testify and corroborate Mr. Kawleski, it makes no
4 sense to me.

5 THE COURT: All right. Mr. Bugni, why don't we zero in
6 on the part that I think -- there was a part that's new here.
7 So we didn't know anything about Mr. Cecil before, but what's
8 left? What is he really saying? And before you do that, let's
9 just address your analysis of the PNY flash drive itself. I
10 gather from your memo that that yielded nothing of value to you.

11 MR. BUGNI: Yes. It yielded only that we cannot say
12 what computer that they were downloaded to. That was the hope,
13 that it would say whether or not it came from a gaming device or
14 whether or not it came from another computer, and we could see
15 nothing from that.

16 THE COURT: All right. So that's -- there's nothing
17 new there. So what we have really is Mr. Cecil's statement --

18 MR. BUGNI: Correct.

19 THE COURT: -- and if we boil it all down, it really is
20 Mr. Cecil's statement that Tracy Brown told him at one time, "I
21 had had the flash drive for some time." Is that the nub of it?

22 MR. BUGNI: It's -- yeah. Yes, yes. "I've had the
23 flash drive for some time," but also that, "I've seen these
24 underage -- these photos, these inappropriate photos, of Mr.
25 Kawleski and his stepdaughter," and describing that. So, you

1 know, it's a twofer. One, "I've had it for a long time," and,
2 two, in 2016 or 2017 her saying, "I've seen these photos. You
3 know, they're troubling to me," and those photos are of, you
4 know, Kawleski's underage daughter. When they go to the
5 computer, there's no photos there, and she never reported ever
6 otherwise seeing these inappropriate photos of Mr. Kawleski and
7 his daughter, and it's not a fair -- it's a reasonable jump that
8 the underage photos that she's talking about are actually the
9 videos that were at the basis of the indictment.

10 THE COURT: It is not -- tell me what you're saying.
11 There's nothing to say what -- we don't know what photos she's
12 talking about in the Cecil statement.

13 MR. BUGNI: Correct. It's just not unreasonable to
14 assume or for a jury to assume that those are -- that she's
15 talking about these videos because there's no other
16 inappropriate photos that we have of, you know -- that Mr.
17 Kawleski took of Amanda.

18 THE COURT: Well, I guess the question becomes she had,
19 in Mr. Cecil's version, referred to a photograph of the
20 stepdaughter flashing Kawleski, and nothing that was charged in
21 the indictment could fairly be described as flashing Mr.
22 Kawleski.

23 MR. BUGNI: Correct. Everything would be characterized
24 as inappropriate, which is what -- you know, that's also how she
25 described it.

THE COURT: Uh-huh.

2 MR. BUGNI: And, Your Honor, if I could just speak to
3 that, it wouldn't be unreasonable for her to minimize what she
4 had seen. You know, she's in a custody battle with Mr. Cecil or
5 they're raising a kid, and if she tells him, "Hey, I saw, you
6 know, Mr. Kawleski sexually assault his daughter," he's probably
7 like, "Look, you've got to go to the police or you've got to get
8 my kid away from Mr. Kawleski. I don't want him around her."
9 He already doesn't like Kawleski, so she would minimize what she
10 had seen. That's not an unfair assumption that when she repeats
11 it to Cecil, she says, "Hey, it's not -- you know, it's not
12 everything that I have seen, but it's something inappropriate.
13 It's involving flashing of the stepdaughter. It's something
14 that is inappropriate," and that's what she was reporting to
15 Mr. Cecil.

16 THE COURT: Help me understand how this would come in
17 at trial. I think you tried to lay it out in your memo, but it
18 does seem to me that it's -- it seems like it's hearsay to me.
19 You said it wouldn't be admissible for the truth, but I don't
20 see how we get around the fact that we're actually looking at
21 statements that Tracy Brown made out of court that need to be
22 true for them to be of use. "I had the flash drive for a long
23 time." That's got to be true for it to be relevant.

24 MR. BUGNI: Well, that has to be true. The
25 inappropriate photos and the fact that, like, she saw them in

1 2016, I don't need that to be true. In fact, I don't believe
2 it's true. I believe she saw the shower videos or the sexual
3 assault. But I'm offering that in -- three years before she
4 says she finds the flash drive, there's evidence that she's
5 found inappropriate pictures, and these inappropriate pictures
6 are the same ones that are on the flash drive. She couldn't
7 have otherwise seen it. She couldn't -- if she found it in
8 2019, then she wouldn't have reported seeing of the same genre
9 of inappropriate pictures in 2016, and so that's what I'm
10 offering it for is that verbal act, that she tips it off, "Look,
11 I saw it before I could have otherwise seen it," and that's what
12 the key is. But, you know, her statement, "I've had the flash
13 drive or held onto it, you know, longer than what I said," that
14 is a true statement. I would need that to actually be true.

15 THE COURT: So then that comes -- that's really just a
16 prior inconsistent statement that you get to confront Tracy
17 Brown with.

18 MR. BUGNI: Correct, but it's a very important prior
19 inconsistent statement. I mean, you know, I tried to
20 distinguish between mere impeachment and kind of the core, vital
21 impeachment. I went back --

22 THE COURT: That's a different issue. We'll work
23 through that, but at this point I just want to try to visualize
24 what the trial is going to be like. So you get to confront
25 Tracy Brown with this prior inconsistent statement that she made

1 to Mr. Cecil about having actually seen inappropriate images and
2 having the flash drive for a long time prior to 2019. And then
3 you get to confront her with that, but you don't get to put in
4 extrinsic evidence to support that prior inconsistent statement.

5 MR. BUGNI: You're right. I would not be able to put
6 in if it was a tangential matter, but I think this goes to the
7 core matter. Your discretion would be you could let me bring it
8 in or you could keep it out as far as, like, what I would be
9 able to impeach that with. I think this would go to such a core
10 issue that this would involve *Chambers* and -- I forget -- *South*
11 *Carolina v. Holmes* where you would have the discretion, you
12 would say, "This is to such a core matter under the Sixth
13 Amendment that I'm going to let Bugni impeach with extrinsic
14 evidence of this." So I don't think it's -- it's not taken out
15 that I could never do this. It would be up to your discretion
16 to do it.

17 THE COURT: Uh-huh. Okay. So let's talk then about
18 the standards that are applicable here, and I think that -- you
19 tell me where we disagree. First of all, this is all
20 discretionary with me. I get the discretionary decision. I
21 think the case -- I've forgotten the case now but the one that
22 you cited and relied on most centrally where the Court of
23 Appeals affirmed the decision to grant a new trial on impeaching
24 evidence because the DEA analyst was under a cloud of
25 investigation. What's the name of that case? Is that *Rogers*?

1 MR. BUGNI: *Baker.*

2 THE COURT: *Baker.* All right. So the interesting
3 thing about that case is that the Court begins by saying, "Hey,
4 look, this really illustrates what discretion means because this
5 very same testimony is at issue in several cases, and judges
6 have granted new trials and denied new trials considering the
7 same evidence, and we're affirming all of them, the grant and
8 the denial. It's a discretionary -- that's what discretion
9 means." And so I take your point that if this were impeachment
10 of such an important point, I could grant a new trial, and that
11 would be sustained. At the same time I could say, "Actually,
12 it's not very good impeachment. I'm going to deny the new trial
13 because it's not very powerful impeachment."

14 MR. BUGNI: That would be unfortunate, but I think
15 you're right. You have that -- like, this is really a
16 discretionary call.

17 THE COURT: Yeah.

18 MR. BUGNI: I would -- go ahead.

19 THE COURT: Ms. Przybylinski Finn, do you agree with
20 the standards that are applicable here?

21 MS. PRZYBYLINSKI FINN: I do agree that it's the
22 Court's discretion as to whether to grant a new trial, but the
23 standards are that it's extremely rare and that the evidence has
24 to be admissible. I mean, those are the important standards.
25 Of course the Court has discretion, but I just -- I can't get

1 around the fact that Cecil is just a liar and a troublemaker. I
2 mean, he's changed his story. His story is inconsistent even
3 with the person he gives as his alibi, his ex-girlfriend A.H.
4 She doesn't even corroborate him. It sort of flows with whoever
5 is asking him the questions. So how that can be a basis for a
6 new trial, it's just --

7 THE COURT: Help me understand that, Ms. Przybylinski
8 Finn, because I understand the inconsistencies that you pointed
9 out, but I don't know if I would really describe that as rising
10 to the level of characterizing him as a liar. He's got
11 variations on what he has said, but I don't know if I would say,
12 "Oh, yeah. He's lied about this or lied about that."

13 MS. PRZYBYLINSKI FINN: Well --

14 THE COURT: He has the opinion that the images came
15 from the Apple tower, which apparently there's nothing to
16 corroborate that and there's no real basis for it, but I don't
17 know if I'd characterize that as a lie. It's kind of his
18 surmise, and, of course, if it came down to it, whether we
19 needed that surmise to get a new trial, I would reject that
20 because we're not going through a new trial on Mr. Cecil's
21 surmise about where the images came from. But I don't know if
22 I'd quite characterize him as a liar. He's a little all over
23 the map, but I don't know if I'd really categorize him as a
24 liar.

25 MS. PRZYBYLINSKI FINN: Well, he's a liar in these two

1 ways: He told Bailey in 2018 -- so he tells Detective Bailey
2 that in the year 2018 Tracy Brown told him that the defendant
3 gave her an Apple tower computer and that on that computer she
4 found videos of the defendant with underage girls. That is 100
5 percent not true.

6 Detective Bailey then asks Cecil whether Brown shared any
7 details about the videos. Cecil responded that Brown did not
8 share details and said only that the videos were of underage
9 girls. Now, had she actually said that, "I saw pictures of
10 Alex's stepdaughter and him flashing her [verbatim]," had she
11 actually said that, the time to have come clean on that is when
12 he's talking to Detective Bailey. He's absolutely clear that he
13 says she's got the tower, that she told him she saw the videos
14 on the tower, and that the videos were just of underage girls
15 and nothing more specific. It's only when Mr. Bugni or his
16 investigator goes and talks to him later that now suddenly he
17 says, "Well, she didn't" -- she said that it was his -- Alex's
18 stepdaughter and that it was his stepdaughter flashing him.

19 It's true that it was speculation on his part that she
20 copied the videos onto the flash drive from the computer, but he
21 starts by saying, "She told me that these videos were on the
22 Apple tower computer," and that was the focus all along, and now
23 the story is just changing to just sort of, you know, fit into
24 sort of this new idea of what, you know, that somebody is
25 suggesting might have happened. Again, Cecil uses his

1 ex-girlfriend to say, "Hey, you can ask her. She was there.
2 She knows what happened." She says, "Absolutely not. I was not
3 there. I don't know what he's even talking about. What I do
4 know is this, is that Tracy Brown called me when she found that
5 flash drive and said, 'I found these upsetting things. I turned
6 them into the police, and now I'm sick to my stomach, and I
7 don't know what to do.'" That's absolutely consistent with
8 trial testimony. So to me when we look at what Cecil has
9 actually provided, it's really just sort of this vague
10 suggestion, maybe vindictive on his part, that he just doesn't
11 think that's the way it happened.

12 And, finally, when we're talking about what's reasonable
13 and unreasonable, it makes -- Tracy Brown doesn't know federal
14 law. She doesn't understand that a flash drive has to have
15 traveled in interstate commerce for an element of the federal
16 offense, so why would she make all this up? Who cares? I mean,
17 it shows a crime. It shows him committing a crime. She doesn't
18 need to jump through all these hoops with the police and say
19 here's -- make up a way that she found it or, if you buy into
20 Mr. Bugni's suggestion that she kept this for years and years
21 and years to just finally turn it in when the time was right,
22 and the time's right because Mr. Kawleski didn't go bowling with
23 her? I mean, it just doesn't make sense. And so we're talking
24 about what's reasonable and unreasonable. That's unreasonable.

25 THE COURT: All right. Mr. Bugni, what else do you

1 have to explain?

2 MR. BUGNI: Just a few things, Your Honor. One, the
3 suggestion that we've somehow fed Mr. Cecil what he should say,
4 that's ridiculous. Detective Bailey doesn't have the vested
5 interest in this case that we do, and the fact that our
6 interview, we asked more pointed questions, that's for you to
7 decide when you see him, Mr. Cecil.

8 Second thing, Bailey's interview wasn't recorded. If this
9 was -- you know, what was actually said in Bailey's -- you know,
10 it should have been recorded.

11 And, third, Your Honor, the point is Kawleski would know
12 that this was missing. If she hadn't taken it and copied it,
13 this is not the kind of flash drive that is just, you know,
14 hanging out there. And we've also brought to you --

15 Sorry, Your Honor. Are you still there? Everything is
16 frozen --

17 THE COURT: I'm still here. I can see you --

18 MR. BUGNI: Sorry.

19 THE COURT: -- and everybody is moving on my end.

20 MR. BUGNI: Okay. Sorry. Mine is not working as well.
21 The other problem with that, Your Honor, is when -- you
22 know, we have that text message right after -- when Kawleski is
23 arrested and he gets out on bond, he's texting, "Hey, I still
24 didn't even know it was there" -- I can't remember the exact
25 term -- or, "I didn't know it was still there yet," and it shows

1 that this was not something that he had held onto and that he
2 was, you know, aware of at that time, and that fits with his
3 testimony or what the proffered testimony would be. Cecil fits
4 with that, and when you're looking at what a jury would decide
5 and whether or not they would find that this was reasonable, you
6 have to weigh all these facts. It's not just did he do
7 something wrong. I've always embraced that. Opening statements
8 through closing, we've always embraced that Kawleski did
9 something terrible, but the question is whether or not he
10 possessed this hard drive in January 2019, and the question is
11 also whether or not he was the one who copied that flash drive.

12 Now, I used, you know, an argument in closing that you
13 can't trust Brown's testimony. It was incredible, the fact
14 that, like, she had this premonition or this intuition that
15 something was going to go wrong, and she goes and just happens
16 to pick the one flash drive, happens to have somebody on the
17 phone, and she's going through it the whole time. It seemed a
18 very difficult story to buy when there's another story to buy,
19 and it's right there, and this is a very reasonable story, and
20 this is actually, like, a true story, and it's backed up by
21 facts. And that's why Cecil's testimony is so important. It
22 reframes everything, and it says years earlier, right around
23 when Kawleski destroys this flash drive, the flash drive that he
24 had put it on, Brown makes this weird call to Cecil and says,
25 "Hey, I found these inappropriate photos." There's no other

1 explanation, and Bailey doesn't push. Where else would there
2 have been inappropriate photos? Where else would that have come
3 from?

4 And the next step should be we're talking about these
5 videos. She finds these videos. She doesn't know what to do.
6 She calls Cecil. She kind of gives him a weak version of what
7 she had seen, and she holds onto it. She doesn't want to turn
8 him in yet. You know, hopefully everything goes on well with
9 their relationship, and, you know, maybe it never has to be
10 used. But she held onto this, and then when things went really
11 sour -- and it's not because he didn't go bowling. It's because
12 he was flirting with another girl and continuing his cheating
13 ways on her and a huge fight ensues. That's a huge point, Your
14 Honor, and that's actually -- that's what raises a reasonable
15 doubt whether or not, you know, she had -- he possessed this
16 flash drive in 2019 when it's charged and whether or not he was
17 the one who copied it onto the PNY flash drive.

18 THE COURT: A couple of points here: One is you had
19 almost all of this theory available to you at the time of the
20 trial. The only bit that you didn't have was the relatively
21 modest corroboration of your theory that there was the statement
22 that Cecil reports that Tracy Brown said sometime previously,
23 "I've seen these inappropriate images or have had this flash
24 drive a long time." But the whole idea that Kawleski had gotten
25 rid of the flash drive, you had all that available to you

1 because it comes from Kawleski himself, and so -- and the attack
2 on Tracy Brown's credibility was sort of the centerpiece of your
3 defense, so all that was on the table, and you tried to impeach
4 her credibility, with some success in my view. I thought, I
5 don't know, her story does not ring true in every detail.

6 Which leads me to the second point, which is the problems
7 with Tracy Brown's testimony don't necessarily suggest -- in
8 fact, I think it's kind of extraordinary to say that it suggests
9 that she's the one who made the flash drive. It suggests to me
10 that she knew what might have been on that flash drive because
11 she had seen inappropriate images that Kawleski had before. And
12 so, yeah, that's inconsistent with what she said, but it's not
13 devastating impeachment in the sense that it doesn't show that
14 she made the flash drive. It just shows that she probably knew
15 about it before, and, of course, she didn't want to say she knew
16 about it before and didn't do anything, so she denies any prior
17 knowledge of it. But the point being that she FaceTimed with
18 her friend on the way home because she had a strong inkling of
19 what was going to be on that flash drive, and it had nothing to
20 do with Mr. Kawleski flirting with other women. It was the
21 images of minors that she was aware of somehow.

22 And so those are two observations that to me diminish the
23 importance of the new evidence that you have from Mr. Cecil.

24 MR. BUGNI: Sure. So I'll address both of them. So as
25 to the first point, Your Honor, I did have all of the -- I had

1 Kawleski's story from the beginning, whatever day it was. I
2 think it was February 25th of 2019 when I first met with him. I
3 had to make tactical decisions in this trial because if you
4 remember, it was Counts 2 through 15, I think 2 through 15 or 2
5 through 14, they were the attempt counts, and if I put Kawleski
6 on the stand and I go all in that she transferred the PNY flash
7 drive, all they have to do is ask what camera did you use? What
8 did you use in this attempt? And so I can win Count 1 with
9 this -- with Kawleski, but then I lose 2 through 16 or 2 through
10 15. If I go in and I win on 2 through 15 with the interstate
11 commerce, which is ultimately what you granted a Rule 29 on, I
12 still have a better argument on 1 and 16 that I did make to the
13 jury -- or Count 1 and Count 16 I conceded. I said, "Look, I've
14 got to give them something because nobody is going to want to
15 walk away letting Kawleski get away free."

16 Those were all the tactical decisions I had to make. So
17 whether I would go back in time and make the same arguments, I
18 don't know. If I had Cecil's testimony, that would have been
19 really hard to pass up because I think it would have really gone
20 to the core of my argument against Tracy Brown, which was really
21 Count 1. I tend to think that you would -- I would have gotten
22 a reversal on the Rule 29 on Counts 2 through 15 in the Court of
23 Appeals. I think it was -- your analysis was absolutely
24 correct. It was what I had argued, you know, from opening
25 statement through or when I first made the Rule 29. The PNY

1 flash drive was not used in the attempt. So I probably would
2 have been willing to sacrifice that for Count 1, but it would
3 have been a tough choice, and I don't have a time machine to see
4 exactly what I would have done, but I know that Cecil would have
5 made it a very hard choice, and I probably -- you know, would I
6 put Kawleski on the stand? Probably. Would I have used Cecil?
7 Definitely. I mean, I was using everything I could to impeach
8 Brown, and you're right about her story.

9 The second is it's hard to say what's reasonable. Now, do
10 I agree that in normal human behavior she probably saw this
11 beforehand and that explains a lot of, like, why she happened to
12 choose the one? Yeah, I think that's a pretty fair argument,
13 Your Honor, except for the fact that Kawleski burns it. So he's
14 got to burn something, and he could have burned the wrong one.
15 It's completely possible. He's been drinking. He's been in a
16 bad drinking bout during that time, but he burns one. Could he
17 have burned the wrong one? Absolutely. He could have
18 completely burned the wrong one. It seems unlikely though given
19 the difference in the description. So that has to lead to one
20 other reality is that Brown had it, and she transfers it, and
21 it's not that she transfers it because she knows the federal
22 jurisdiction. She transfers it because she'd always have that
23 evidence. Kawleski probably would recognize if that flash drive
24 was gone if she would -- you know, he goes back to find it.
25 "Where's the gray flash drive? Where is the bluish-gray flash

1 drive? I know it should be here."

2 That's why it's different than just the reasonable, yeah,
3 she knew -- she's seen it before, and she always knew it was
4 there. That's not a bad inference. That's a very fair
5 inference that you're making, Your Honor, except that Kawleski
6 destroys one. And I think when you see that text message, "I
7 didn't even know I had that thing yet," like, that tends to
8 substantiate that this is a guy who said, "Hey, I destroyed this
9 thing. I didn't even know I had this four years ago or three
10 years ago," however long it had been that he had destroyed it.

11 So those are the two points, Your Honor, when you're
12 looking at the discretionary call and whether or not that rises
13 to a reasonable doubt, that is the type of thing that a jury
14 would latch onto. I think I would latch onto it. It allows for
15 that inference and really it allows for a reasonable
16 probability -- or I can't remember -- probably a not guilty
17 verdict. It probably raises a reasonable doubt.

18 THE COURT: Ms. Przybylinski Finn, anything else for
19 the government?

20 MS. PRZYBYLINSKI FINN: Your Honor, I would just note
21 that I don't think that the text message corroborates anything
22 at all. It doesn't say, "This is nuts. I burned that thing."
23 This doesn't say, "Are you crazy? I threw that thing in a
24 fire." So I don't think the text message does much of anything.

25 Secondly, the idea that she happened to find this thumb

1 drive and copy it before he decided to throw it in the fire
2 sometime that we don't know when that is, again, this is all --
3 this is so speculative, there's nothing to corroborate it, and
4 it just certainly is not a basis for a new trial here. Mr.
5 Kawleski had his trial. He had all the evidence. He had an
6 opportunity to have an expert look at that flash drive yet again
7 and, as the Court pointed out, must not have found anything
8 useful on that or we'd be talking about that today.

9 So I just -- it just strikes me there's just nothing here
10 that goes to that whole this is an extraordinary remedy. We go
11 back to a new trial is an extraordinary remedy, and there is
12 nothing to support it here.

13 THE COURT: All right. Mr. Bugni, you got anything
14 else?

15 MR. BUGNI: Your Honor, I would just make two points:
16 It is an extraordinary remedy, but it's extraordinary that we're
17 talking about a man going down for 15 years when there would be
18 a more robust case, his opportunity to make the complete
19 arguments that he's entitled to make. Again, we've never denied
20 that he did something terribly wrong, and the equities are not
21 on our side when it comes to that, but that's not what the
22 demand is. The demand is what the law demands, and here the law
23 supports our reading of what -- you know, what our showing has
24 been even if it's just Count 16. Count 16, did he have
25 possession of this flash drive in 2019? Then when it comes to

1 Count 1, we've shown a reasonable probability or we've shown
2 that it would probably lead to a different result.

3 As far as the text message, you're right, it doesn't go
4 that far to say, "I thought I burned it," but it says, "I didn't
5 even know I had that thing. I didn't even know I had that
6 thing." This is contemporaneous. This is, you know, sent on
7 February 16th, 2019. He just gets out on bond, and they're
8 texting back and forth. That's a huge indicator, Your Honor,
9 that what we're offering is truthful, that this is a man who
10 thought he had destroyed that flash drive, and everything else
11 that's happened supports that.

12 Your Honor, I would just ask you to exercise your
13 discretion and allow him to proceed to a new trial with this
14 evidence and with Mr. Cecil.

15 THE COURT: All right. I'm going to deny the motion
16 for a new trial. I don't think we -- based on the proffer that
17 I've had here, we don't need any further evidentiary hearing on
18 this. I think what we have here is a theory that was
19 fundamentally available to the defense at the time of the trial.
20 What has emerged since the trial has been Mr. Cecil's
21 statements, which offer at best some modest corroboration of Ms.
22 Brown's knowledge of questionable images of minors at an earlier
23 date. I'm not sure how it gets presented at trial. As I said,
24 it seems to me that it's a prior inconsistent statement that Ms.
25 Brown can be confronted with. I don't think it actually is very

1 compelling evidence that she created the flash drive. It
2 suggests to me at best that she knew that Mr. Kawleski had
3 inappropriate images of minors earlier, which is the part of her
4 testimony that I found a little bit questionable.

5 But the jury had, at the time it made its decision, had Mr.
6 Bugni's attack on her credibility, and as a matter of trial
7 strategy, Mr. Bugni chose not to put Mr. Kawleski on the stand
8 so that he could present what he had of this theory, which was a
9 lot of it, which is the theory that the flash drive that he had
10 actually created had been burned, but he chose not to present
11 that for strategic reasons, and matters of trial strategy, it
12 seems to me, are really not -- not in and of themselves a basis
13 for a new trial. I recognize that newly discovered evidence can
14 have a dramatic impact on trial strategy, but I don't think this
15 is that case. There is a little bit of additional evidence that
16 Mr. Bugni didn't know about from Mr. Cecil that he didn't have
17 at the time, but I don't think it really is so transformative
18 that it would have produced a completely different strategy and
19 result in a different result. So I don't think that it is
20 evidence of the scale that really would warrant a new trial. I
21 don't -- I just don't think that it is that significant that it
22 warrants doing the new trial on the counts that are left, which
23 I guess are really just Count 1 and Count 16.

24 So I'm going to deny the motion for a new trial. I'll just
25 do a written order that confirms this. It's not going to have a

1 lot of reasoning in it -- I'm giving you that now -- and from my
2 questions I'd just indicate that what we have is statements from
3 Mr. Cecil that at best suggests that Tracy Brown knew about
4 the -- about some inappropriate images of the minors. We don't
5 know what they are. Inappropriate images cover a pretty broad
6 spectrum, and then that also might explain the peculiarities of
7 the story that she told, which seemed odd because it did seem to
8 me that maybe she had an inkling of what was on the flash drive
9 that she had, but none of that comes close to any sort of
10 evidence that suggests that anybody other than Mr. Kawleski
11 actually produced that flash drive.

12 So I'm going to deny the motion for a new trial. We don't
13 need any further hearing on it. I'll just issue an order that
14 summarizes that, and then we can proceed with the sentencing.

15 Is there anything else we needed to address today, Ms.
16 Przybylinski Finn?

17 MS. PRZYBYLINSKI FINN: No, not for the United States,
18 Your Honor.

19 THE COURT: All right. Mr. Bugni?

20 MR. BUGNI: Can we schedule sentencing now?

21 THE COURT: Yeah. Let's see. So we have a presentence
22 report, I believe, so that --

23 MR. BUGNI: We had to do objections -- sorry.

24 THE COURT: What's left?

25 MR. BUGNI: I think we have objections, and they'll

1 have to revise it with the multicount analysis, but it shouldn't
2 be much based upon Counts 2 through 15 being dismissed, so maybe
3 the first or second week in January? I don't want to push
4 probation, but I don't think there needs --

5 THE COURT: Well, I don't have the input -- I don't
6 have input from probation about how long they need to revise the
7 report so why -- let's do this: Tell me what dates you're
8 looking at, what range. So first or second week of January. So
9 I infer from this you would like to get the sentencing done as
10 soon as possible, Mr. Bugni. Is that the takeaway here?

11 MR. BUGNI: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. BUGNI: He's been in jail for two years so --

14 THE COURT: I understand, and I'm happy to be
15 supportive of that.

16 Ms. Przybylinski Finn, are there any constraints, any
17 objections on the government's part to going as quickly as we
18 can to get to sentencing?

19 MS. PRZYBYLINSKI FINN: No, Your Honor, but I agree
20 with Mr. Bugni. We've not done objections, and I don't know
21 what the final PSR will look like, so I would ask for the second
22 week in January at least just to give everybody an opportunity.

23 THE COURT: All right. Here's what I'm going to do --

24 MS. PRZYBYLINSKI FINN: If that works for Ms. Altman.

25 THE COURT: Well, and, again, I would -- the person

1 that matters most or at least first here is the officer, and I
2 can't even remember who wrote the presentence report. So I've
3 got to find out from the officer who has got to revise the
4 presentence report what kind of time they need, and I'm sure
5 they're not -- they don't need a huge amount of time. But let's
6 aim for the second week in January, but before I commit us to
7 that, I'm going to check with probation and make sure that they
8 can get that -- get the revised report done, and then you'll
9 have an objection period. So how long do you need for
10 objections? A week?

11 MS. PRZYBYLINSKI FINN: A week is fine.

12 MR. BUGNI: A week, yeah. A week is fine.

13 THE COURT: Okay. So if not for the fact that there's
14 the holiday in the middle there and I don't know what the
15 workload of this officer is, the second week of January should
16 work for me. So let me check with that officer and see if we
17 can do that, and then we will -- let's look at some days here on
18 the second week. Let's aim toward the end of the second week of
19 January. So what if we were to do January 14th?

20 MR. BUGNI: Perfect.

21 MS. PRZYBYLINSKI FINN: That works for the government.

22 THE COURT: Okay. So let's go 10:00 a.m. I'll fill in
23 the interim dates after I talk to the probation officer, and
24 that's all contingent on this working out with the supervising
25 officer. If it doesn't, I'll have Susie reach out and contact

1 you to pick a different date.

2 MS. PRZYBYLINSKI FINN: And it's Mariah Johnson, Your
3 Honor.

4 THE COURT: Okay. I'll check with her this afternoon.

5 MS. PRZYBYLINSKI FINN: Thank you.

6 MR. BUGNI: Thank you, Your Honor.

7 THE COURT: All right. Thank you, all.

8 THE CLERK: This court stands adjourned.

9 (Proceedings concluded at 1:44 p.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 16th day of December, 2020, before the Honorable
5 James D. Peterson, Chief U.S. District Judge for the Western
6 District of Wisconsin, in my presence and reduced to writing in
7 accordance with my stenographic notes made at said time and
8 place.

9 Dated this 24th day of February, 2021.

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/s/ Jennifer L. Dobbratz

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Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

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